In the High Court of Uttaranchal, at Nainital.

Criminal Appeal No. 351 of 2004.

Hukum Singh S/o Bhim Sen
R/o Bhura Rani, Rudrapur,
Udham Singh Nagar …. Appellant.

Versus

1- State of Uttaranchal .. Respondent.

Sri Prabhakar Joshi, learned counsel for the appellant.
Sri Amit Bhatt, learned A.G.A.

Coram: Hon'ble Irshad Hussain, J.
Hon'ble B.S. Verma, J.

Dated: 22nd June, 2005.

(P.C.):

Appellant Hukum Singh was arrested on 31.10.1996 in F.I.R. No. 290 /1996 lodged at Out Post, Pant Nagar of P.S. Lalkuan, at 00.30 hours on 22-7-1996 by informant Khem Singh (P.W.3) regarding the occurrence of dacoity committed in a passenger bus at about 22.30 on 21-7-1996. The appellant was not named in the F.I.R. hence test identification parade was held on 24-12-96 at Sub Jail, Haldwani. On the basis of the evidence the appellant was convicted and sentenced to undergo imprisonment for life under Section 395 read with Section 397 I.P.C. per judgment and order dated 20-11-2004 passed by the Additional Sessions Judge/F.T.C., Nainital in Sessions Trial No. 220/1997.

2- According to the prosecution, passenger bus U.G.P. 4736 left Haldwani bus station with more than 30 passengers for Delhi and when the said bus reached near the airport, within the circle of Out Post, Pant Nagar of P.S. Lalkuan at about 10-30 P.M. one of the six miscreants, who were also occupying the seats in the bus and one of them was sitting one the bonnet of the engine near the driver, started threatening the passengers. One of the miscreant asked the driver to retard the motion of the bus and directed him to divert it towards the jungle under the threat of being shot by pistol then possessed by him. The driver of the bus obeyed the command

of the miscreant and stopped the bus towards jungle side at a short distance from the airport. All these six miscreants thereafter robbed the passengers of their valuables and cash. The names of the few of the victms such as Bhupal Singh, Pratap Singh, Khem Singh, Rajendra Singh, Lakshman Anand and others were also mentioned in the F.I.R. prepared after the incident by Khem Singh Bora (P.W.3) and delivered at the said Out post as mentioned above.

3- On the basis of the F.I.R. a case under Section 395 I.P.C. was registered and investigation was taken up by S.I. C.P. Dwivdei (P.W. 5) who seized the passenger bus U.G.P. 4736 which in fact was slightly damaged by the miscreants and its lights were broken and its tyres were got flattened. The Investigating Officer recorded the statements of the witnesses and prepared the site plan of the place of the incident, Ext. Ka.7. He also proved the check F.I.R., Ext. Ka.5 and copy of the G.D. report of the registration of the case, Ext.Ka.6. Later-on on the orders of the Superintendent of Police the investigation was taken up by S.I. Gopal Krishna Tripathi (P.W.4) on 25-7-1996 and the appellant was arrested by him on 13-10-1996. He submitted report for having the test identification parade held and as a consequence thereof the same was arranged in the Sub Jail, Haldwani on 24-12-1996. After completion of the investigation and on receipt of the result of the identification parade, in which the appellant was the sole miscreant identified by the two witnesses viz. Pratap Singh (P.W.1) and Rajendra Singh (P.W.2), charge sheeted on 27.1.1997 vide charge sheet, Ext. Ka.4.

3- Appellant did not admit the accusations of the prosecution and contended that he has been falsely implicated by the police which he also taken his photograph to facilitate his identification by the witnesses.

4- To bring home guilt to the appellant, prosecution relied upon the evidence of six witnesses, five of whom have been referred above and whereas the sixth witness constable Puran Chand (P.W.6) was examined to prove the identification memo, Ext. Ka.1, in view of the fact that Sri H.C. Karnatak, the Executive Magistrate, who conducted the identification parade had meanwhile died. This witness formally proved this document. No evidence was

adducted in defence and the learned Sessions Judge on the basis of has appreciation of the material on record accepted the claim of the prosecution that the substantive evidence of the two witnesses of the identification namely P.W.1 Pratap Singh and P.W.2 Rajendra Singh prove beyond doubt that the appellant was one of the six miscreants who committed dacoity in the afore mentioned passenger bus in the night of the occurrence and accordingly held the appellant guilty and convicted him as aforesaid.

5- Learned counsel for the appellant persuasively argued that the learned Sessions Judge made an error in appreciation of the evidence in as much as the learned Sessions Judge failed to consider the basic aspect of the identification case that there was absolutely no evidence to indicate that the appellant was kept 'Baparda' from the time when his arrest was effected on 31-10-1996 and that in the absence of any evidence to this effect the identification evidence loses its evidentiary value. Learned counsel drew our attention to the statement of P.W.4, S.I. Gopal Krishna Tripathi who gave out that the appellant Hukum Singh was arrested on 31-10-1996 but said not a single word regarding keeping the appellant 'Baparda' from the time of the arrest. This glaring aspect of the matter was not taken note of by the learned Sessions Judge. This apart, as submitted, no link evidence was also adduced to show that as and when the appellant was taken out from the jail for seeking the remand from time to time he was kept 'Baparda' by the police constables and also that the appellant was not shown to anybody while he was being detained in jail during the period till he was put to test identification on 24.12.1996. Not only the prosecution was careless to adduce the evidence in this regard but the learned Sessions Judge also made gross error in not considering theis legal omission, particularly when the case rests entirely on identification evidence. There can be no gain saying that this aspect of the matter itself is sufficient to assail the credibility of the prosecution version and its evidence that the appellant was involved in the commission of the crime of dacoity.

6- It was next argued that the profiles and features of the miscreants who committed the dacoity were not described in the

F.I.R. by the informant and it does not stand to reason as to how the two witnesses P.W.1 and P.W.2 were able to lay their hands upon the appellant as one of the culprit when they participated in the test identification parade. It is also of significance that the occurrence took place on 21.7.1996 whereas the test identification parade was held on 24.12.1996 that is, after five months and during this long period when the features of the miscreant were not mentioned in the F.I.R. it was highly improbable and difficult for the two witnesses to have kept in memory the features etc of the miscreants to facilitate the identification by them after such a long period. No doubt this aspect of the matter also throw grave doubt in the prosecution and its evidence.

7- It was then submitted that the test identification parade was held after 55 days and no plausible explanation has been given by the prosecution for this delay. As stated above the arrest of the appellant was made on 31.10.1996 and whereas the identification parade was held on 24.12.1996 and there is absolutely not an iota of the evidence to show that what was the difficulty in expediting the holding of the test identification parade by the investigating agency. It is well settled and has also been observed by the Apex Court in the case of Soni versus State of Uttar Pradesh; (1982) 3 Supreme Court Cases 368 (I) that the unexplained delay in holding test identification parade tell upon the credibility of the identification evidence and there can be no doubt that the principle squarely apply to the facts of the case for the reason mentioned above.

8- Lastly attention was also drawn to the fact that the arrest of the appellant was being made on 31-10-1996 but the prosecution evidence does not provide any clue as to what led the Sub Inspector Gopal Krishna Tripathi (P.W.4) to arrest the appellant on that day. If some clues were to be provided by the informer or by any accomplice only then the investigating officer could have laid his hands upon the alleged culprit and the law also require that the reason need to be shown by adducing the evidence on the record and to the person arrested thereof as contemplated by the provisions of Section 51 of the Code of Criminal Procedure. The procedure was also not complied with in this case by the Sub Inspector Gopal

Krishna Tripathi. This aspect of the matter also raises grave doubt in the claim of the prosecution regarding the arrest of the appellant and in the totality of the circumstances of the case it may also be taken to doubt the credibility of the prosecution version and its evidence.

9- For the reasons aforesaid it is thus evident that the learned Sessions Judge had not taken into consideration the attending factors and the material on record and proceeded to convict the accused merely on the basis of the result of the test identification which does not have any evidentiary value and therefore the judgment of the learned Sessions Judge can not legally be maintained. In other words the appeal succeeds and is to be allowed.

10- The appeal is allowed. The judgment and order dated 20-11-2004 passed by the Additional Sessions Judge/F.T.C. Nainital in S.T. No. 220/1997 is set aside. The appellant Hukum Singh is held not guilty for the offence under Section 395 read with Section 397 I.P.C. and is acquitted. The appellant is in jail. He shall be released forthwith if not required in any other case.

11- Let the record be sent back to the learned trial Court for compliance to be reported to the Court within one month.

(B.S. Verma, J.) **(Irshad Hussain, J.)**

ISB